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ALEXANDER L. STEVAS,
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No. 84-68

In The
Supreme Court of the United States
October Term, 1984

KERR-McGEE CORPORATION,
Petitioner,
vs.

THE NAVAJO TRIBE OF INDIANS, et al.,
Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOINT APPENDIX

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**PETITION FOR CERTIORARI FILED JULY 12, 1984
CERTIORARI GRANTED OCTOBER 9, 1984**

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RELEVANT DOCKET ENTRIES
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CAUSE NO. CIV 79-383 M

| <u>Docket No.</u> | <u>Description</u> |
|-------------------|--|
| 1. | Complaint (May 10, 1979) |
| 7. | Plaintiff's Memorandum In Support of Issuance of Preliminary Injunction (May 31, 1979) |
| 9. | Defendants' Motion to Dismiss (June 11, 1979) |
| 12. | Memorandum by Plaintiff In Opposition to Defendants' Motion to Dismiss (June 21, 1979) |
| 14. | Order, inter alia, Dismissing Navajo Tribe Of Indians And Navajo Tax Commission (September 27, 1979) |
| 15. | Responsive Memorandum By Navajo Defendants Opposing Injunctive Relief (November 1, 1979). |
| 19. | Stipulation Re: Uranium Mining Operations And Oil And Gas Operations (December 11, 1979) |
| 27. | Order Partially Transferring Venue (March 12, 1980) |

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CAUSE NO. CIV. 80-247 PHX WPC

| <u>Docket No.</u> | <u>Description</u> |
|-------------------|--|
| 1. | Order Partially Transferring Venue (March 12, 1980) |
| 2. | Defendants' Motion for Summary Judgment with Memorandum and Statement of Facts (June 23, 1980) |
| 7. | First Amended Complaint (October 2, 1980) |
| 8. | Plaintiff's Response to Motion for Summary Judgment (October 20, 1980) |
| 9. | Plaintiff's Statement of Facts Pursuant to Local Rule 11(h) (October 20, 1980) |

12. Reply In Support of Navajo Defendants' Motion for Summary Judgment (November 10, 1980)
14. Stipulation and Order Staying Action (January 5, 1981)
17. Plaintiff's Motion for Summary Judgment (March 5, 1982)
18. Plaintiff's Statement of Facts in Support of Motion for Summary Judgment (March 5, 1982)
20. Defendants' Supplemental Memorandum and Response to Plaintiff's Motion for Summary Judgment (April 7, 1982)
21. Defendants' Statement of Facts Under Local Rule 11(i) In Opposition to Motion for Summary Judgment of Kerr-McGee (April 7, 1982)
23. Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment (April 30, 1982)
- Hearing on pending motions for summary judgment (May 10, 1982)
24. Answer (May 10, 1982)
26. Memorandum Opinion and Order (June 29, 1982)
28. Defendants' Notice of Appeal (July 29, 1982)
30. Plaintiff's Notice of Cross-Appeal (August 13, 1982)
32. Plaintiff's Notice of Voluntary Dismissal re Count 10 and Order Thereon (August 23, 1982)
37. Judgment and Permanent Injunction (September 22, 1982)
38. Defendants' Amended Notice of Appeal (October 15, 1982)
39. Plaintiff's Amended Notice of Cross-Appeal (October 18, 1982)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPEAL NOS. 82-5725 AND 82-5736

| <u>Date</u> | <u>Description</u> |
|--------------------|---|
| September 25, 1982 | — Certificate of record |
| November 22, 1982 | — Opening Brief of Kerr-McGee Corporation |
| January 10, 1983 | — Opening Brief of Navajo Defendants |
| January 28, 1983 | — Amicus Curiae Brief of the United States |
| March 1, 1983 | — Reply/Answering Brief of Kerr-McGee Corporation |
| March 28, 1983 | — Reply Brief of Navajo Defendants |
| April 12, 1983 | — Order granting permission for the United States to participate in oral argument |
| April 15, 1983 | — Oral argument |
| April 15, 1983 | — Order that submission be deferred pending decision of the Tenth Circuit Court of Appeals in <i>Southland Royalty Co. v. Navajo Tribe</i> , No. 79-0140 (D.Utah) |
| September 8, 1983 | — Order submitting appeals for decision |
| September 28, 1983 | — Order permitting supplemental briefing |
| October 11, 1983 | — Supplemental Memorandum of Kerr-McGee Corporation |
| October 13, 1983 | — Supplemental Memorandum of the Navajo Tribe |
| April 17, 1984 | — Opinion of the Ninth Circuit Court of Appeals |
| April 17, 1984 | — Order as to Collateral Estoppel |
| April 17, 1984 | — Judgment of the Ninth Circuit Court of Appeals |

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

NO. CIV 80 247 WPC

KERR-McGEE CORPORATION, a Delaware corporation,
Plaintiff,

vs.

NAVAJO TRIBE OF INDIANS, a tribe of American Indians recognized by the United States Department of the Interior; NAVAJO TAX COMMISSION, an agency of the Navajo Tribe of Indians; PETER MacDONALD, individually and in his official capacity as Chairman of the Tribal Council of the Navajo Tribe of Indians; ROBERT SHORTY, JR., individually and in his official capacity as a member of the Navajo Tax Commission; GLENN GEORGE, individually and in his official capacity as a member of the Navajo Tax Commission; WILLIAM MORGAN, JR., individually and in his official capacity as a member of the Navajo Tax Commission; LAWRENCE WHITE, individually and as Director of the Navajo Tax Commission of the Navajo Tribe of Indians; CECIL D. ANDRUS, individually and in his official capacity as Secretary of the United States Department of the Interior,

Defendants.

FIRST AMENDED
COMPLAINT

(For Declaratory and Injunctive Relief)
(Filed Oct. 1980)

Plaintiff KERR-McGEE CORPORATION, by and through its undersigned attorneys, alleges and complains against Defendants as follows:

INTRODUCTORY STATEMENT

1.

This is an action by KERR-McGEE CORPORATION, which presently conducts oil and gas and mineral operations within the Navajo Indian Reservation ("Reservation") in both New Mexico and Arizona, for declaratory and injunctive relief against the NAVAJO TRIBE OF INDIANS, the NAVAJO TAX COMMISSION, and officials of the NAVAJO TRIBE OF INDIANS, and the Secretary of the United States Department of the Interior. Two Resolutions adopted by the Navajo Tribal Council purport to enact a Business Activity Tax and a Possessory Interest Tax. Both of these taxes purport to apply to Plaintiff and Plaintiff's operations on and under the Reservation, and purport to confer jurisdiction upon the tribal courts to adjudicate all controversies concerning the said taxes. Plaintiff seeks (1) a declaration that the Business Activity Tax and the Possessory Interest Tax are null, void, invalid, illegal and unenforceable against Plaintiff and that Defendants NAVAJO TRIBE OF INDIANS, NAVAJO TAX COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE cannot legally enforce the Business Activity Tax and the

Possessory Interest Tax against Plaintiff; and (2) preliminary and permanent injunctions restraining Defendants NAVAJO TRIBE OF INDIANS, NAVAJO TAX COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE from enforcing the taxes or otherwise interfering in any way with Plaintiff's oil and gas and mineral operations on the Reservation; and (3) interlocutory and permanent injunctions enjoining Defendant CECIL D. ANDRUS affirmatively to restrain the NAVAJO TRIBE OF INDIANS from asserting or enforcing the Business Activity Tax and the Possessory Interest Tax and to restrain the NAVAJO TRIBE OF INDIANS from breaching Plaintiff's oil and gas and mineral leases.

PARTIES

2.

Plaintiff KERR-McGEE CORPORATION is a corporation created under the laws of the State of Delaware, is qualified to do business and is doing business in the States of New Mexico and Arizona.

3.

Defendant NAVAJO TRIBE OF INDIANS ("TRIBE") is a tribe of American Indians situated upon the Reservation in the States of Arizona, New Mexico and Utah.

4.

Defendant NAVAJO TAX COMMISSION ("COMMISSION") is an agency of the TRIBE created by the Tribal Council, which is the governing body of the TRIBE.

5.

Defendant PETER MacDONALD is the Chairman of the Tribal Council of the TRIBE and is its chief executive officer.

6.

Defendants ROBERT SHORTY, JR., GLENN GEORGE and WILLIAM MORGAN, JR., are the members of the COMMISSION. Defendant LAWRENCE WHITE is director of the COMMISSION.

7.

Defendant CECIL D. ANDRUS is the Secretary of the United States Department of the Interior ("Secretary").

8.

Defendants TRIBE and COMMISSION are sued under Counts I through IX of this Complaint. Defendants PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE are sued under the same Counts in their official capacities as officers of the TRIBE and in the alternative in their individual or personal capacities. The actions of Defendants PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE have been done and are threatened to be done under color of Navajo Tribal authority; such actions exceed the lawful authority of the TRIBE and, therefore, subject them personally and individually to the consequences of their individual conduct.

Defendant CECIL D. ANDRUS is sued under Court [sic] X of this Complaint in his official capacity as Secretary of the United States Department of the Interior and, alternatively, in his individual and personal capacity. The complained of action of CECIL D. ANDRUS, although done under color of authority of federal law, exceeds his lawful authority and, therefore, subjects him personally and individually to the consequences of his individual conduct.

JURISDICTION

All of Plaintiff's claims derive from a common nucleus of operative facts. The matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs.

Plaintiff's claims arise in the Districts of New Mexico and Arizona. Each and every Defendant has caused events to occur and is threatening to cause events to occur in the States of New Mexico and Arizona out of which Plaintiff's claims herein against Defendants arise.

Plaintiff's claims in Counts I and II arise under the laws and treaties of the United States, including the federal law of Indian relations and the Treaty of June 1, 1868, 15 Stat. 667; this Court has jurisdiction over said claims by virtue of 28 U.S.C. § 1331 and under the doctrine of pendent jurisdiction.

Plaintiff's claims in Counts III and IX arise under the Constitution and laws of the United States, including the federal law of Indian relations, 25 U.S.C. § 476, 25 U.S.C. § 636, 25 U.S.C. § 396d, 25 U.S.C. § 398e, 25 C.F.R. Part 171, U.S. Constitution, Art. I, § 8 and Art. VI, cl. 2; this Court has jurisdiction over said claims by virtue of 28 U.S.C. § 1331, 28 U.S.C. § 1337 and under the doctrine of pendent jurisdiction.

Plaintiff's claims in Count IV arise under the laws of the United States, including the federal law of Indian relations and 25 U.S.C. § 396a *et seq.*; this Court has jurisdiction over said claims by virtue of 28 U.S.C. § 1331, 28 U.S.C. § 1337 and under the doctrine of pendent jurisdiction.

Plaintiff's claims in Counts V, VI, and VII arise under the Constitution and laws of the United States, including the federal law of Indian relations and the U.S. Constitution, Art. I, § 8 and Art. VI, cl. 2; this Court has jurisdiction over said claims by virtue of 28 U.S.C. § 1331 and under the doctrine of pendent jurisdiction.

Plaintiff's claims in Count VIII arise under the Constitution and laws of the United States, including the federal law of Indian relations, the Indian Civil Rights Act of 1968 (25 U.S.C. § 1301 *et seq.*) and the U.S. Constitution, Fifth Amendment; this Court has jurisdiction over said

claims by virtue of 28 U.S.C. § 1331, 28 U.S.C. § 1343(4) and under the doctrine of pendent jurisdiction.

17.

Plaintiff's claims in Count X arise under the laws of the United States, including the federal law of Indian relations, 25 U.S.C. § 476, 25 U.S.C. § 636, and 25 U.S.C. § 396d; this Court has jurisdiction over said claims by virtue of 28 U.S.C. § 1331, 28 U.S.C. § 1337, 28 U.S.C. § 1361 and under the doctrine of pendent jurisdiction.

GENERAL ALLEGATIONS

18.

The TRIBE is a tribe of American Indians situated upon a reservation created in part by treaty and in part by executive order in the States of Arizona, New Mexico and Utah. The TRIBE has never adopted and presently does not possess any written constitution, but its self-governing powers are ostensibly vested in the Navajo Tribal Council ("Tribal Council"). The Tribal Council is the supreme tier of tribal government, and all agencies of the TRIBE, including its courts, are subject and subservient thereto.

19.

The COMMISSION, of which Defendants ROBERT SHORTY, JR., GLENN GEORGE and WILLIAM MORGAN, JR. are members and Defendant LAWRENCE WHITE is director, is an agency of the TRIBE charged by the Tribal Council with the responsibility of interpreting, applying and enforcing the Possessory Interest Tax and the Business Activity Tax.

20.

On or about January 27, 1978 and April 28, 1978, the Tribal Council adopted Resolutions CJA-13-78 and CAP-36-78 respectively (attached hereto as Exhibits A and B) by virtue of which the Possessory Interest Tax and the Business Activity Tax were enacted. The Business Activity Tax purports to require Plaintiff (1) to file declarations of tax due on May 15, August 15, November 15 and February 15 of each calendar year, (2) to pay taxes purportedly due on the said dates and (3) to designate a natural person as the individual responsible for filing declarations of tax and for making payments on taxes purportedly due. The Business Activity Tax purports to be effective as of July 1, 1978, and purports to apply to every sale, either within or without the Reservation, of a "Navajo good or service" at a rate not less than four percent (4%) nor greater than eight percent (8%), which rate is presently set at five percent (5%). The Possessory Interest Tax purports to require Plaintiff (1) to designate a natural person to act on its behalf with respect to all matters involving the Possessory Interest Tax, and (2) to pay the Possessory Interest Tax in two installments, one-half (1/2) due on February 15 and one-half (1/2) due on August 15 of each calendar year. The Possessory Interest Tax purports to apply to every leasehold interest on or under the Reservation that has a value in excess of \$100,000 at a rate of not less than one percent (1%) nor greater than ten percent (10%), which rate is presently set at three percent (3%). Both the Business Activity Tax and the Possessory Interest Tax purport to empower the COMMISSION to subject Plaintiff to a number of penalties in the event of non-compliance, including "permanent loss of all rights

to engage in productive activity" on or under the Reservation. Neither of the resolutions purporting to enact said taxes has been approved or disapproved by the Secretary of the United States Department of the Interior.

21.

Plaintiff currently engages in uranium mining operations on certain portions of the Reservation situated in the State of New Mexico pursuant to the following mineral leases:

- (1) Contract No. 14-20-0603-9988, dated June 21, 1966;
- (2) Contract No. 14-20-0603-9990, dated June 21, 1966;
- (3) Contract No. 14-20-0603-9987, dated June 21, 1966;
- (4) Contract No. NOO-C-14-20-3894, dated June 21, 1971;
- (5) Contract No. NOO-C-14-20-3895, dated June 21, 1971; and
- (6) Contract No. NOO-C-14-20-3986, dated June 21, 1971.

22.

The aforesaid mineral leases, after having been approved by the Tribal Council, were all duly issued to Plaintiff by the Secretary of the United States Department of the Interior pursuant to 25 U.S.C.A. § 396a. The said leases are all presently valid and binding upon Plaintiff on the one hand and the TRIBE and the United States on the other hand.

23.

Plaintiff currently engages in oil and gas operations on certain portions of the Reservation situated in the State of Arizona pursuant to the following oil and gas leases:

- (1) Contract No. 14-20-0603-8822, dated October 9, 1964;
- (2) Contract No. 14-20-0603-8823, dated October 9, 1964;
- (3) Contract No. 14-20-0603-8824, dated October 12, 1964;
- (4) Contract No. 14-20-0603-8888, dated January 15, 1965; and
- (5) Contract No. 14-20-0603-8889, dated January 15, 1965.

24.

The aforesaid oil and gas leases, after having been approved by the Tribal Council, were all duly issued to Plaintiff by the Secretary of the United States Department of the Interior pursuant to 25 U.S.C.A. § 396a. The said leases are all valid and binding upon Plaintiff on the one hand and the TRIBE and the United States on the other hand.

25.

In reliance upon the validity and enforceability of the aforesaid oil and gas and mineral leases, Plaintiff has made extensive improvements and commitments of resources and has undertaken substantial development under its oil and gas and mineral leases at a significant cost to Plaintiff.

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26.

Plaintiff has paid in excess of \$1,843,000 in rentals and royalties to the TRIBE through March of 1979 in connection with its mineral operations which began production in 1976. Plaintiff has paid a total of \$111,377 in rentals and a total of \$7,539,490 in royalties to the TRIBE in connection with its oil and gas operations from February, 1967, through March, 1979.

27.

Plaintiff employs in connection with its mining operations on the Reservation a work force of approximately 394, of which 257 are Navajo Indians. Indian employees comprise approximately sixty percent (60%) of Plaintiff's work force in connection with said operations.

CLAIMS FOR RELIEF

COUNT I.

(Lack of Inherent Power)

28.

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

29.

Through the Navajo Tribal Council, the TRIBE exercises powers of self-government over its members.

30.

The powers of self-government which the TRIBE exercises are limited to those powers which the Congress of

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the United States has not expressly terminated and which are not inconsistent with its dependent status.

31.

The dependent status of the TRIBE is such that whatever power it may once have had to determine independently external relations between the TRIBE and its members on the one hand and non-members on the other hand has been extinguished.

32.

The TRIBE has no criminal or civil jurisdiction over non-Indians and non-members thereof, and the TRIBE has no power to tax non-Indians and non-members thereof.

33.

Plaintiff is neither an Indian nor a member of the TRIBE.

34.

The Business Activity Tax and the Possessory Interest Tax purport to apply to Plaintiff and purport to empower the TRIBE to suspend permanently Plaintiff's right to engage in oil and gas and mineral operations on and under the Reservation in the event of non-compliance with the said taxes. Such penalties are criminal or quasi-criminal in nature. The TRIBE does not have criminal or quasi-criminal jurisdiction over non-members or non-Indians.

35.

Plaintiff is not a trespasser, but instead is entitled to be present on and remain on the Reservation pursuant to

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the aforementioned valid and binding oil and gas and mineral leases.

36.

The TRIBE cannot unilaterally suspend Plaintiff's right to engage in oil and gas and mineral operations on and under the Reservation.

37.

As applied to Plaintiff, the Business Activity Tax and the Possessory Interest Tax represent tribal efforts to determine independently tribal relations with a non-Indian and non-member which has a legal right to engage in oil and gas and mineral operations on and under the Reservation.

38.

As applied to Plaintiff, the Business Activity Tax and the Possessory Interest Tax are null, void, invalid, illegal and unenforceable.

39.

Defendants TRIBE, COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE cannot legally enforce the Business Activity Tax and the Possessory Interest Tax against Plaintiff.

COUNT II.

(Treaty Limitations on Tribal Power)

40.

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

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41.

The TRIBE and the United States entered into the Treaty of June 1, 1868, 15 Stat. 667 ("Treaty").

42.

The Treaty is presently in effect and valid and binding upon the TRIBE.

43.

The Treaty prohibits the TRIBE from opposing the construction and operation of works of utility or necessity permitted by the laws of the United States.

44.

Plaintiff's oil and gas and mineral operations constitute "other work[s] of utility or necessity . . . permitted by the laws of the United States" within the purview of the Treaty.

45.

The Business Activity Tax and the Possessory Interest Tax, as applied to Plaintiff, constitute an opposition prohibited by the Treaty.

46.

The Treaty vests in the United States exclusive criminal and civil authority and jurisdiction over non-Indians and non-members.

47.

The Treaty prohibits the TRIBE from asserting criminal and civil authority and jurisdiction over non-Indians and non-members of the TRIBE.

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48.

Plaintiff is neither an Indian nor a member of the
TRIBE.

49.

Plaintiff is not a trespasser, but instead is entitled
to be present on and remain on the Reservation pursuant
to the aforementioned valid and binding oil and gas mineral
leases.

50.

As applied to Plaintiff, the Business Activity Tax
and the Possessory Interest Tax constitute an assertion
of tribal criminal and civil authority and jurisdiction over
a non-Indian and non-member in violation of the Treaty.

51.

As applied to Plaintiff, the Business Activity Tax and
the Possessory Interest Tax are null, void, illegal, invalid
and unenforceable.

52.

Defendants TRIBE, COMMISSION, PETER Mac-
DONALD, ROBERT SHORTY, JR., GLENN GEORGE,
WILLIAM MORGAN, JR. and LAWRENCE WHITE
cannot legally enforce the Business Activity Tax and the
Possessory Interest Tax against Plaintiff.

COUNT III.

(Federal Pre-emption of Regulation
of Operations Under Oil and Gas
and Mineral Leases)

53.

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

54.

The Congress of the United States possesses full, complete and plenary power over the TRIBE and its relations with non-Indians and non-members of the TRIBE.

55.

The Congress of the United States has provided for an extensive, all-inclusive and comprehensive statutory scheme by which oil and gas and mineral leases on Indian reservations, including the Reservation, are to be issued and maintained. The Congress of the United States has expressly provided that all operations under oil and gas and mineral leases on Indian reservations, including the Reservation, shall be subject to rules and regulations promulgated by the Secretary of the Interior.

56.

Pursuant to congressional mandate, the Secretary of the Interior has promulgated an extensive, all-inclusive and comprehensive set of rules and regulations to which the issuance of and operations under the oil and gas and mineral leases of Plaintiff are solely and exclusively subject.

57.

Neither the leases, statutes nor the regulations permit unilateral control of any kind by the TRIBE or any mem-

ber thereof over Plaintiff or over Plaintiff's operations under the aforementioned oil and gas and mineral leases.

58.

The Business Activity Tax and the Possessory Interest Tax, to the extent they may be applied to Plaintiff and Plaintiff's operations under the aforementioned oil and gas and mineral leases, are inconsistent with and unduly conflict with the federal legislation and regulation governing issuance of and operations under said leases.

59.

All of Plaintiff's mineral leases are on portions of the Reservation which were created by executive order. The Congress of the United States has conferred upon the States of Arizona and New Mexico the sole and exclusive right to levy and collect taxes upon the

"improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations. . . ."

60.

The Congress of the United States has pre-empted whatever power and authority the TRIBE might otherwise have had to apply the Business Activity Tax and the Possessory Interest Tax to Plaintiff and to its property and operations on the Reservation.

61.

As applied to Plaintiff and to its property and operations on the Reservation, the Business Activity Tax and

the Possessory Interest Tax are void, null, invalid, illegal and unenforceable.

62.

Defendants TRIBE, COMMISSION, PETER MACDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE cannot legally enforce the Business Activity Tax and the Possessory Interest Tax against Plaintiff or its operations.

COUNT IV.

(Breach of Contract)

63.

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

64.

The aforementioned oil and gas leases all provide for the following rental and royalty:

" . . . a rental of \$1.25 per acre per annum in advance during the continuance hereof, the rental so paid for any one year to be credited on the royalty for that year, together with a royalty of 16 2/3 percent of the value or amount of all oil, gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased herein, save and except oil, and/or gas used by the lessee for development and operation purposes on said lease, which oil or gas shall be royalty free."

The foregoing rental and royalty provisions are valid and binding upon Plaintiff, the TRIBE and the United States.

65.

The TRIBE, the United States and Plaintiff agreed that the foregoing rentals and royalties would be the sole and exclusive monetary compensation to the TRIBE and the United States in consideration for Plaintiff's operations under the aforementioned oil and gas leases.

66.

The TRIBE, the United States and Plaintiff agreed that the foregoing rentals and royalties on the aforementioned oil and gas leases could not be changed or modified without Plaintiff's consent.

67.

The aforementioned mineral leases all provide for various rates of rentals and royalties which are valid and binding upon Plaintiff, the TRIBE and the United States.

68.

The TRIBE, the United States and Plaintiff agreed that the various rentals and royalties would be the sole and exclusive monetary compensation to the TRIBE and the United States in consideration for Plaintiff's operations under the aforementioned mineral leases.

69.

The TRIBE, the United States and Plaintiff agreed that the various rentals and royalties on the aforementioned mineral leases could not be changed or modified without Plaintiff's consent.

70.

As applied to Plaintiff, the Business Activity Tax and the Possessory Interest Tax effect a unilateral modification in the rates of rental and royalty in the aforementioned oil and gas and mineral leases, to which Plaintiff has not consented.

71.

The said unilateral modification constitutes a breach of the aforementioned oil and gas and mineral leases by virtue of which Plaintiff, the TRIBE and the United States all agreed upon acceptable and binding rates of rental and royalty.

72.

In the aforementioned oil and gas and mineral leases, the United States and the TRIBE covenanted that Plaintiff would be entitled to the quiet and peaceable enjoyment of the demised premises. The Business Activity Tax and the Possessory Interest Tax purport to provide for permanent suspension of Plaintiff's rights to engage in oil and gas and mineral operations on and under the Reservation, as well as other penalties, in the event of non-compliance therewith. Enforcement of the said penalties will constitute a violation of Plaintiff's right to enjoy the demised premises in a quiet and peaceable manner.

73.

Defendants TRIBE, COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE cannot legally enforce the Business Activity Tax and the Possessory Interest Tax against Plaintiff.

COUNT V.

74.

(The Commerce Clause)

(Privilege of Engaging in Interstate Commerce)

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

75.

Article I, Section 8 of the United States Constitution grants to the Congress of the United States the exclusive power to regulate commerce among the several states and with the Indian tribes ("Commerce"). As a result of this grant of exclusive power to the Congress, states and Indian tribes, including the TRIBE, are precluded from imposing any tax on the privilege of engaging in Commerce.

76.

Plaintiff is engaged in the production and shipment from the Reservation of oil and gas and minerals to surrounding states, and its oil and gas and mineral operations on and under the Reservation are an integral and inseparable part of the flow of Commerce.

77.

The Business Activity Tax is a tax on all sales made by Plaintiff within or without the Reservation of "Navajo goods or services." It is not related in any way to any benefits provided to Plaintiff by the TRIBE.

78.

The Business Activity Tax is unconstitutional on its face and as applied to Plaintiff because it creates a tax on the privilege of engaging in Commerce.

79.

Defendants TRIBE, COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE cannot legally enforce the Business Activity Tax against Plaintiff.

COUNT VI.

(The Commerce Clause)

(Discrimination Against Interstate Commerce)

80.

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

81.

As a result of the constitutional grant to the Congress of the United States of exclusive power to regulate Commerce, states and Indian tribes, including the TRIBE, are prohibited from imposing any tax which discriminates against Commerce.

82.

The Possessory Interest Tax and the Business Activity Tax provide a direct commercial advantage to local business. The taxes exempt from taxation the enterprises,

activities and possessory interests of the TRIBE. With few exceptions Reservation land is communally owned, and, therefore, few, if any, Navajo Indians own leaseholds in real property subject to the Possessory Interest Tax. The Possessory Interest Tax exempts from taxation those possessory interests valued at less than \$100,000. Few, if any, Navajo Indians own leaseholds in real property with values of \$100,000 or more. Persons engaging in "traditional activities" are exempt from taxation under the Business Activity Tax. Few, if any, persons other than Navajo Indians are engaged in traditional activities on the Reservation.

83.

The Possessory Interest Tax and the Business Activity Tax are unconstitutional on their face and as applied to Plaintiff in that they create a tax which discriminates against Commerce.

84.

Defendants TRIBE, COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE cannot legally enforce the Business Activity Tax and the Possessory Interest Tax against Plaintiff.

COUNT VII.
(The Commerce Clause)
(Multiple Taxation)

85.

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

86.

As a result of the Constitutional grant to the Congress of the United States of exclusive power to regulate Commerce, states and Indian tribes, including the TRIBE, are precluded from imposing any tax which subjects Commerce to multiple taxation.

87.

Plaintiff sells oil and gas and minerals in Commerce, and Plaintiff's operations on and under the Reservation are an integral part of the flow of Commerce.

88.

Plaintiff is subject to taxation by various states, including Arizona and New Mexico, for the same oil and gas and mineral sales to which the Business Activity Tax purports to apply.

89.

The Business Activity Tax is unconstitutional on its face and as applied to Plaintiff because it creates a multiple tax, without allocation, on Plaintiff's sales in Commerce.

90.

Defendants TRIBE, COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE cannot legally enforce the Business Activity Tax against Plaintiff.

COUNT VIII.

(Due Process and Equal Protection)

91.

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

92.

The Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.*, prohibits any Indian tribe, including the TRIBE, from taking the property of any person or depriving any person, including Plaintiff, of liberty or property without just compensation and due process of law and from denying any person, including Plaintiff, within its jurisdiction equal protection of its laws.

93.

The Fifth Amendment of the Constitution of the United States prohibits any Indian Tribe, including the TRIBE, from taking the property of any non-member or depriving any non-member, including Plaintiff, of liberty or property without compensation and due process of law, and from denying any non-member, including Plaintiff, within its jurisdiction equal protection of the law.

94.

Plaintiff is neither an Indian nor a member of the TRIBE, and is excluded by federal law and tribal law from voting or otherwise participating in the tribal decision-making process on the grounds of race and ethnic character.

95.

Plaintiff's aforementioned oil and gas and mineral leases confer contract, property and liberty rights upon

the Plaintiff, including specific and limited rental and royalty rates.

96.

The Possessory Interest Tax and the Business Activity Tax are void and invalid on their face and as applied to Plaintiff because they effect a taking of Plaintiff's contract, property and liberty rights without just compensation and deny Plaintiff's equal protection rights in violation of the Indian Civil Rights Act and the Fifth Amendment of the Constitution of the United States.

97.

The Business Activity Tax and the Possessory Interest Tax exempt from taxation the enterprises, activities and possessory interests of the TRIBE. With few exceptions, Reservation land is communally owned, and, therefore, few, if any, Navajo Indians own leaseholds in real property subject to the Possessory Interest Tax. The Possessory Interest Tax exempts from taxation those possessory interests valued at less than \$100,000. Few, if any, Navajo Indians own leaseholds in real property with values of \$100,000 or more. Persons engaging in "traditional activities" are exempt from taxation under the Business Activity Tax. Few, if any, persons other than Navajo Indians are engaged in traditional activities on the Reservation.

98.

The Business Activity Tax and the Possessory Interest Tax were enacted with the actual intent and purpose to subject the sales and possessory interests of only non-Indians such as Plaintiff to taxation. The effect of the

Business Activity Tax and the Possessory Interest Tax is to subject the sales and possessory interests of only non-Indians such as Plaintiff to taxation. There is no compelling tribal interest to justify the creation of such a racial classification.

99.

The Possessory Interest Tax and the Business Activity Tax are void and invalid on their face and as applied to Plaintiff because they subject Plaintiff to taxation without representation and, because they are arbitrary, vague and confiscatory, contrary to the due process requirements of the Indian Civil Rights Act and the Fifth Amendment of the Constitution of the United States.

100.

Defendants TRIBE, COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE cannot legally enforce the Business Activity Tax and the Possessory Interest Tax against Plaintiff.

COUNT IX.

(Lack of Approval by the Secretary of the Interior)

101.

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

102.

Approval by the SECRETARY is required as a condition precedent to the effectiveness and validity of any

tribal constitution or by-laws vesting governmental powers in any tribe. Approval by the SECRETARY is also required as a condition precedent to the validity of any tribal ordinance or resolution, particularly in the absence of an approved constitution.

103.

The TRIBE has never adopted and the SECRETARY has never approved any constitution. Nor have resolutions CJA-13-78 and CAP-36-78 been approved by the SECRETARY.

104.

The TRIBE lacks authority or power to assert or enforce the Business Activity Tax or the Possessory Interest Tax against Plaintiff or Plaintiff's property without approval by the SECRETARY. Any attempt by the TRIBE to assert or to enforce the Business Activity Tax or the Possessory Interest Tax against Plaintiff or Plaintiff's property without approval by the SECRETARY is unlawful and illegal.

105.

As applied to Plaintiff, the Business Activity Tax and the Possessory Interest Tax are null, void, illegal, invalid and unenforceable.

106.

Defendants TRIBE, COMMISSION, PETER MACDONALD, ROBERT SHORTY, JR., GLEN GEORGE, WILLIAM MORGAN, JR., and LAWRENCE WHITE cannot legally enforce the Business Activity Tax and the Possessory Interest Tax against Plaintiff or Plaintiff's property.

COUNT X.

(Duty of Secretary of the Interior)

107.

Plaintiff incorporates by reference each and every allegation set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

108.

The Congress of the United States has expressly provided in 25 U.S.C. § 396(d) that:

"All operations under any oil, gas, or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior."

109.

The SECRETARY has a mandatory and non-discretionary duty and obligation to ensure that "all operations under any oil, gas, or other mineral lease," are subject only to the rules and regulations promulgated by the SECRETARY and are not subjected to tribal ordinances, resolutions or other actions that lack approval by the SECRETARY.

110.

The Business Activity Tax and the Possessory Interest Tax purport to subject Plaintiff's operations under its oil and gas and mineral leases to tribal ordinances and regulations that lack approval by the SECRETARY and

that constitute rules and regulations other than those promulgated by the SECRETARY.

111.

The SECRETARY has a mandatory and non-discretionary duty and obligation to ensure that Plaintiff's oil and gas and mineral leases are not breached by the TRIBE by asserting or enforcing the Business Activity Tax or Possessory Interest Tax.

112.

The SECRETARY has not delegated any portion of his authority to the Navajo defendants and has refused to approve the Business Activity Tax and the Possessory Interest Tax and, therefore, cannot legally allow the Business Activity Tax and the Possessory Interest Tax to be enforced against Plaintiff.

IMMINENT HARM AND IRREPARABLE INJURY

113.

The Business Activity Tax was enacted by the Tribal Council on or about April 28, 1978, but purports to have become effective as of July 1, 1978. The Possessory Interest Tax was enacted by the Tribal Council on or about January 26, 1978, but purports to have become effective as of January 1, 1978.

114.

The Business Activity Tax and the Possessory Interest Tax purport to authorize the COMMISSION to suspend the rights of any person, including Plaintiff, who

fails to file a declaration of tax, to engage in productive activity on or under the Reservation. The said taxes further purport to empower the COMMISSION to attach and seize the assets of any taxable person, including Plaintiff.

115.

The Business Activity Tax and the Possessory Interest Tax have a direct and immediate impact upon Plaintiff, inasmuch as they place Plaintiff in the dilemma of either paying funds which may never be recovered in the event said taxes are ultimately declared illegal and unenforceable or risking the threat of attachment and seizure of all of Plaintiff's oil and gas and mineral operations, as well as loss of Plaintiff's rights to engage in productive activity on and under the Reservation. The taxes purportedly due under the Business Activities Tax are due on a date forty-five (45) days after formal adoption by the COMMISSION of the final rules and regulations thereunder.

116.

Plaintiff has no adequate remedy at law. Unless the Defendants are preliminarily and permanently restrained by this Court from applying and enforcing the Business Activity Tax and the Possessory Interest Tax to and against Plaintiff, they will continue to harm Plaintiff irreparably as hereinabove alleged.

WHEREFORE, Plaintiff prays for relief as follows:

(1) For a declaratory judgment pursuant to 28 U.S.C. § 2201 against the TRIBE, the COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN

GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE, and each of them, declaring that the Business Activity Tax and the Possessory Interest Tax are null, void, illegal, invalid and unenforceable against Plaintiff;

(2) For a declaratory judgment pursuant to 28 U.S.C. § 2201 against the SECRETARY declaring that said Defendant has a mandatory and non-discretionary duty and obligation to ensure that all operations under Plaintiff's oil and gas and mineral leases are subject only to the rules and regulations promulgated by the SECRETARY and are not subject to the Business Activity Tax and the Possessory Interest Tax, or either of them, which lack approval by the SECRETARY.

(3) For a declaratory judgment pursuant to 28 U.S.C. § 2201 against the SECRETARY declaring that said Defendant has a mandatory and non-discretionary duty and obligation to ensure that Plaintiff's oil and gas and mineral leases are not breached by the TRIBE's asserting or enforcing the Business Activity Tax and the Possessory Interest Tax.

(4) For a preliminary injunction and a permanent injunction against the TRIBE, the COMMISSION, PETER MacDONALD, ROBERT SHORTY, JR., GLENN GEORGE, WILLIAM MORGAN, JR. and LAWRENCE WHITE as well as their successors, restraining and enjoining them as follows:

(a) From applying, enforcing or attempting to enforce the Business Activity Tax and the Possessory Interest Tax against Plaintiff;

(b) From levying, collecting, attempting to assess or attempting to collect against or from Plaintiff any and all taxes enacted by the TRIBE;

(c) From initiating, accepting for filing or conducting any legal proceeding against Plaintiff in any and all tribal court(s); from seeking or issuing any order to show cause restraining order or injunction, whether interlocutory or final, judgment or other process or order of any nature from any such court based upon or arising out of the Business Activity Tax or the Possessory Interest Tax or both or Plaintiff's operations under its aforementioned oil and gas and mineral leases;

(d) From interfering with, obstructing, impairing, or hampering the conduct or operation of any of Plaintiff's facilities or other facilities related to, supportive of or incidental to Plaintiff's operations under its aforementioned oil and gas and mineral leases;

(e) From attaching and seizing Plaintiff's assets and from denying Plaintiff, its officers, employees, or its suppliers, contractors or other licensees or invitees ingress to and egress from its operations under the aforementioned oil and gas and mineral leases; and

(f) From otherwise attempting or purporting to regulate, tax or assert governmental authority over Plaintiff;

(5) For a mandatory injunction against the SECRETARY affirmatively to restrain the TRIBE from asserting or enforcing the Business Activity Tax and the Possessory Interest Tax, or either of them, against Plaintiff, prior to approval of such taxes by the SECRETARY.

(6) For a mandatory injunction against the SECRETARY enjoining the SECRETARY affirmatively to restrain the TRIBE from breaching Plaintiff's oil and gas and mineral leases by asserting or enforcing the Business Activity Tax and the Possessory Interest Tax.

(7) For Plaintiff's costs herein and for interest thereon at the rate of six percent (6%) per annum until paid; and

(8) For such other and further relief against the Defendants, and each of them, as is fair, just and equitable in the premises.

DATED this 30th day of September, 1980.

Evans, Kitchel & Jenckes, P.C.
By /s/ Fred E. Ferguson, Jr.
F. Pendleton Gaines, III
Alvin H. Shrago
363 North First Avenue
Phoenix, Arizona 85003

and

Campbell & Black, P.A.
Post Office Box 2208
Santa Fe, New Mexico 87501
Attorneys for Plaintiff
Kerr-McGee Corporation

CERTIFICATE OF SERVICE

I hereby certify that a copy of Plaintiff's First Amended Complaint was mailed this 2d day of October, 1980, to:

Clayburgh, Ashby, Rose & Paskind, P.A.
618 Manzano, N.E.
Albuquerque, New Mexico 87110

Vlassis & Ruzow
1545 West Thomas Road
Phoenix, Arizona 85015

/s/ Alvin H. Shrago

EXHIBIT A

CJA-13-78
Class "A" Resolution
Washington Approval
Required.

RESOLUTION OF THE NAVAJO TRIBAL COUNCIL Enacting the Navajo Possessory Interest Tax

WHEREAS:

1. The right to tax is part of the inherent sovereignty of any Nation; and
2. Navajo revenues from royalties and other traditional sources of income are depleting both in terms of nominal and constant dollars; and
3. Navajo population and Navajo needs are increasing, with the increase in the need for services partly a result of increased employment and development within the Navajo Nation; and
4. Like all other governments, it is appropriate for the Navajo Nation to call upon those possessing wealth within the Navajo Nation to share in the costs of providing governmental services to the residents of the Navajo Nation; and

5. By Navajo Tribal Council Resolution CJA-6-74 of January 10, 1974, the Navajo Tax Commission was created and it has made its initial reports to this Council and recommended the imposition of taxes on wealth and economic activity within the Navajo Nation; and

6. The Navajo Tax Commission has developed a proposed "Possessory Interest Tax" attached hereto as Exhibit "A", which recommends it be enacted into law by the Navajo Tribal Council.

NOW THEREFORE BE IT RESOLVED THAT:

1. The "Possessory Interest Tax" attached hereto as Exhibit "A" is hereby approved.
2. The Navajo Tax Commission is empowered to administer this tax.
3. The Courts of the Navajo Nation are vested with jurisdiction:
 - a) over any and all persons subject to this resolution.
 - b) to hear and determine any challenge to the validity of this resolution, either generally, or as applied to any person.
4. All resolutions or parts of resolutions (or attachments thereto) which are inconsistent with the provision of this resolution are hereby repealed, including, without limitation, any resolution purporting to waive any right of taxation by the Navajo Nation.
5. This resolution shall become effective January 01, 1978 after approval by the Navajo Tribal Council.
6. If any provision of this resolution or the Navajo Possessory Interest Tax or its application to any person

or circumstance is held invalid by a final judgment of a court of competent jurisdiction, the invalidity shall not affect other provisions or applications of the tax which can be given effect without the invalid provision or application, and to this end the provisions of this resolution and the Navajo Possessory Interest Tax are severable.

7. During the pendency of any litigation or arbitration concerning the validity of this resolution, the Controller of the Navajo Nation is authorized and directed to place all payments made to the Navajo Nation pursuant to this resolution in interest-bearing obligations of the United States or interest-bearing accounts insured by an agency of the United States.

Following the termination of any such litigation or arbitration (and the conclusions of any appeals), and subject to any Order by any Court or Arbitrator rendering a decision or judgment therein, the Controller of the Navajo Nation shall remit to the prevailing party or parties any and all sums collected, together with the interest earned thereon. The Controller of the Navajo Nation is further directed to keep all such funds separate and apart from other funds under his supervisions and control.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 35 in favor and 13 opposed, this 26th day of January, 1978.

/s/ Wilson C. Skut
Vice Chairman
Navajo Tribal Council

EXHIBIT "A" POSSESSORY INTEREST TAX

PART A: INTRODUCTION

SECTION 1. PREAMBLE.

The Possessory Interest Tax is designed to require those possessing wealth within the Navajo Nation to contribute to the cost of providing governmental services to the residents of the Navajo Nation. Because the Possessory Interest Tax focuses on the sources of wealth within the Navajo Nation created in part by the activities of the government of the Navajo Nation, the tax will, in large be paid by the beneficiaries of those activities.

SECTION 2. NAME

This Act shall be called the Possessory Interest Tax.

PART B: OPERATIVE RULES

SECTION 3. DEFINITIONS.

Subject to additional definitions contained in subsequent sections, and unless the context otherwise requires, in this Act.

(a) *Possessory Interest.* For the purposes of this Act, a "possessory interest" is the value of a lease granted by the Navajo Nation. The tax is not on improvements but, rather, on the value of the lease site and underlying resources such as coal, oil, gas, and uranium.

(b) *Taxable Persons.* A "taxable person" is any person having ownership rights in any possessory interest within the Navajo Nation.

(c) *Fraud*. "Fraud" has the same meaning as that established in the interpretation of Section 7206 of Title 26 of the United States Code.

(d) *Commission*. "Commission" means the Navajo Tax Commission.

SECTION 4. COMPUTATION OF TAX.

The tax due under this Act is the value of the possessory interest as determined by the Navajo Tax Commission, multiplied by the tax rate established in Section 7.

SECTION 5. COMPUTATION OF VALUE OF POSSESSORY INTERESTS.

The value of a possessory interest shall be computed as provided in this section or by any other method adopted by the Navajo Tax Commission which accurately reflects the fair market value of the possessory interest in question.

(a) *Fair Market Value Method*. The value of a possessory interest may be computed by comparing the interest to be valued with comparable interests (whether within or without the Navajo Nation) which are sold by willing sellers or willing buyers, neither of whom are under a compulsion to act; or

(b) *Present Value of Income to be Received*. The value of a possessory interest may be computed by capitalizing the value of the gross income from the property and subtracting them from the capitalized value of the reasonable expenses to be incurred. Such capitalization shall be done for the life of the possessory interest in question.

(i) With respect to possessory interests whose term is indefinite, the term of the possessory interest shall be presumed to be 25 years.

SECTION 6. EXEMPTIONS AND DEDUCTIONS.

(a) Exemptions.

(i) No possessory interests with value less than \$100,000 shall be subject to this tax; *provided, however*, that all possessory interests owned by a taxable person within the Navajo Nation shall be combined to determine the eligibility of said taxable person for this exemption.

(ii) Nothing within this Act shall be construed as imposing a tax on the government of the Navajo Nation or on any wholly owned subdivision or enterprise of the government of the Navajo Nation, nor requiring the filing of any Designation, Declaration, or other report by such party.

(b) *Deductions*. In computing the present value of income to be received pursuant to Section 5(b) of this Act, deductions from gross income shall be permitted for reasonable expenses as set forth in the regulations of the Commission.

SECTION 7. RATE OF TAX.

A tax is assessed on possessory interests within the Navajo Nation at a rate established or to be established in regulations of the Commission. The rate will be no less than one percent (1%), nor greater than ten percent (10%), and until some other rate is established by the Commission, the tax rate shall be three percent (3%).

SECTION 8. PERIOD OF TAX.

The tax under this Act shall be assessed annually based upon the value of possessory interest within the Navajo Nation on January 1st of each year.

SECTION 9. FILING OF TAX DECLARATION.

Every non-exempt taxable person within the Navajo Nation shall designate some natural person as the individual empowered by the taxable person to act on behalf of the taxable person with respect to all matters involving this Act.

SECTION 10. PAYMENT OF TAX.

The possessory interest tax shall be paid in two installments, one-half ($\frac{1}{2}$) being due on or before August 15th of each year and the other one-half ($\frac{1}{2}$) being due on or before August 15th of the same year. For the year 1978 the tax shall be paid in two installments, one-half ($\frac{1}{2}$) being due on or before the 180th day after passage of the resolution adopting this tax and one-half ($\frac{1}{2}$) being due one or before the 300th day after passage of said resolution.

SECTION 11. APPEAL PROCEDURES FOR CONTESTED TAX LIABILITIES.

(a) Appeals of assessments are to be made in the first instance to the Commission according to the Rules and Regulations of the Commission.

(b) Appeals from a determination of the Commission are to be made to the Court of Appeals of the Navajo Nation, according to procedures established by the Com-

mission, but in no case may an appeal be made to the Court of Appeals of the Navajo Nation until payment of the amount determined by the Commission has first been made.

(c) The Commission shall be empowered to hold contested amounts in interest-bearing obligations of the United States, according to procedures which it shall establish.

SECTION 12. PENALTIES FOR FAILURE TO FILE.

(a) If a designated person required under Section 9 to file a declaration on behalf of a taxable person fails to file the declaration in a timely manner, a penalty of not more than one-half of one percent (.5%) of the value of the possessory interest may be assessed against such person by the Commission.

(b) An additional penalty of not more than two-tenths of one percent (.2%) of the value of the possessory interest may be assessed by the Commission for each month's delay in filing a declaration.

SECTION 13. PENALTIES FOR FAILURE TO PAY.

(a) A taxable person failing to pay an amount assessed at the time due will be subject to a penalty of five percent (5%) of the amount assessed.

(b) A taxable person failing to pay an amount assessed at the time due will be subject to an additional penalty on one-half percent ($\frac{1}{2}\%$) of the amount due for each full month of delay in making payment.

SECTION 14. EXTENSION OF TIME FOR FILING DECLARATION.

A person responsible for filing a declaration on behalf of a taxable person may request an extension of time for complying with the requirements of Section 9. The request should be made to the Commission in writing and must be made before the due date for the declaration. An extension of time will be granted only for good cause and at the discretion of the Commission.

SECTION 15. EXTENSION OF TIME FOR PAYING TAX.

The Commission may establish procedures for staying the due date for taxes assessed which are being appealed before the Commission.

SECTION 16. COLLECTION POWERS.

The Commission shall have full power to collect taxes and penalties assessed, including the power to attach and seize assets of a taxable person.

SECTION 17. PENALTY FOR FAILURE TO DESIGNATE PERSON TO FILE.

A taxable person required to file a declaration under Section 9 who fails to designate a person to file, as required, may have all rights to engage in productive activity within the Navajo Nation suspended by the Commission and shall be subject to permanent loss of all rights to engage in productive activity with the Navajo Nation.

SECTION 18. INTEREST.

Interest at an annual rate to be provided in the regulations of the Commission shall be collected on any unpaid amount of tax from the date the payment was due to the date payment is received, and shall be remitted to the taxpayer on any overpayment of tax from the date the payment was made to the date the overpayment is refunded.

SECTION 19. PENALTIES FOR ATTEMPT TO EVADE OR DEFEAT TAX.

(a) Any taxable person underpaying the tax imposed under this Act due to negligence or intentional disregard of the rules and regulations (but without the intent to defraud) shall be penalized One Hundred Dollars (\$100.00) for each offense plus ten percent (10%) of the under payment of tax.

(b) If any part of an underpayment of tax is shown to be due to fraud, a taxable person shall be penalized no less than twenty-five percent (25%) and no more than one hundred percent (100%) of the underpayment of tax.

(c) Any person who assists a taxable person in the fraudulent underpayment of taxes due under this Act shall be subject to a penalty of no less than \$100 for each underpayment plus twenty-five percent (25%) of the underpayment.

(d) Penalties shall be imposed in the first instance by the Commission subject to review by the Court of Appeals of the Navajo Nation.

SECTION 20. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

No suit for the purpose of restraining the assessment or collection of the tax imposed under this Act shall be maintained in any court by any person, whether or not such person is the person whom such tax was assessed.

SECTION 21. NONDISCRIMINATION.

No provision of this Act shall be construed as imposing a tax which discriminates on the basis of whether a Navajo Branch is owned or controlled by members of the Navajo Tribe.

SECTION 22. POWER TO NEGOTIATE TAX AGREEMENTS.

Thee Commission is authorized to negotiate mutual assessment and collection assistance agreements with any other tax jurisdiction. The agreements so negotiated will come into force only upon ratification by the Advisory Committee of the Navajo Tribal Council.

EXHIBIT B

Class "C" Resolution
No BIA Action Required.

RESOLUTION OF THE NAVAJO TRIBAL COUNCIL

*Enacting the Navajo Business Activity Tax
and Clarifying the Question of Compensation
of Commission Members*

WHEREAS:

1. The right to tax is part of the inherent sovereignty of any Nation; and

2. Navajo revenues from royalties and other traditional sources of income are shrinking, both in terms of nominal and constant dollars; and

3. Navajo population and Navajo needs are increasing, with the increase in the need for services partly a result of increased employment and development within the Navajo Nation; and

4. Like all other governments, it is appropriate for the Navajo Nation to call upon those doing business or engaged in economic activity within the Navajo Nation to share in the costs of providing governmental services to the residents of the Navajo Nation; and

5. By Navajo Tribal Council Resolution CJA-6-74 of January 16, 1974, the Navajo Tax Commission was created and it has made its initial reports to this Council and recommended the imposition of taxes on wealth and economic activity within the Navajo Nation; and

6. The Navajo Tax Commission has developed a proposed "Business Activity Tax" attached hereto as Exhibit "A" which it recommends be enacted into law by the Navajo Tribal Council; and

7. Questions have arisen concerning the appropriate compensation (or honoraria) to be paid Commission members, particularly members who are also employees of the Navajo Nation.

NOW THEREFORE BE IT RESOLVED THAT:

1. The "Business Activity Tax" attached hereto as Exhibit "A" is hereby approved.
2. The Navajo Tax Commission is empowered to administer this tax.
3. The Courts of the Navajo Nation are vested with jurisdiction:
 - a) over any and all persons subject to this resolution.
 - b) to hear and determine any challenge to the validity of this resolution, either generally, or as applied to any person.
4. All resolutions or parts of resolutions (or attachments thereto) which are inconsistent with the provisions of this resolution are hereby repealed, including, without limitation, any resolution purporting to waive any right of taxation by the Navajo Nation.
5. This resolution shall take effect upon approval by the Navajo Tribal Council. The tax imposed by this Act shall be due and payable for calendar quarters beginning July 1, 1978.
6. If any provision of this resolution or the Navajo Business Activity Tax, or its application to any person or circumstance is held invalid by a final judgment of a court of competent jurisdiction, the invalidity shall not affect other provisions or applications of the tax which can be given effect without the invalid provision or application, and to this end the provisions of this resolution and the Navajo Business Activity Tax are severable.
7. During the pendency of any litigation or arbitration concerning the validity of this resolution, the Con-

troller of the Navajo Nation is authorized and directed to place all payments made to the Navajo Nation pursuant to this resolution in interest-bearing obligations of the United States or interest-bearing accounts insured by an agency of the United States.

Following the termination of any such litigation or arbitration (and the conclusions of any appeals), and subject to any Order by any Court or Arbitrator rendering a decision or judgment therein, the Controller of the Navajo Nation shall remit to the prevailing party or parties any and all sums collected, together with the interest earned thereon.

The Controller of the Navajo Nation is directed to keep all such funds separate and apart from other funds under his supervisions and control.

8. Commission members shall be compensated under such terms and conditions as the Commission may by resolution determine, provided however, that compensation in excess of \$150.00 per day shall be subject to the prior approval of the Budget and Finance Committee of the Navajo Tribal Council and provided further that any Commissioner who is also an employee of the Navajo Nation shall take leave without pay from his or her position with the Navajo Nation during periods while he or she is engaged in Commission business for which he or she is to be compensated by the Commission.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed

by a vote of 41 in favor and 11 opposed, this 28th day of April, 1978.

/s/ Peter MacDonald
Chairman
Navajo Tribal Council

EXHIBIT "A"

BUSINESS ACTIVITY TAX

PART A: INTRODUCTION

SECTION 1. PREAMBLE.

The Business Activity Tax is designed to allow the Navajo people to share in the economic benefits generated within the Navajo Nation. The tax is assessed on the net dollar value contributed by a business enterprise to the output of economic goods and services in the Navajo Nation. The business enterprise is the vehicle through which individuals, in their roles as consumers or as suppliers of land, labor, or capital, derive the benefits of economic activity. As an intermediary in the economic process, the enterprise is a convenient and efficient instrument for collecting taxes on those enjoying the benefits of the economic activity taking place within the Navajo Nation.

SECTION 2. NAME.

The tax imposed by this Act shall be called the Business Activity Tax.

PART B: OPERATIVE RULES

SECTION 3. DEFINITIONS.

Subject to additional definitions (if any) contained in the subsequent sections of this Act and unless the context otherwise requires, in this Act;

(a) *Navajo Branch.* A "Navajo Branch" means any corporation, unincorporated association, partnership, trust, estate, joint venture, or any part of the foregoing, or any individual or group of individuals of any government (other than the government of the Navajo Nation) which engages in trade, commerce, manufacture, power production, or any other productive activity (whether for profit or not) wholly or in part within the Navajo Nation. It does not include, however, any subdivision or enterprise of the government of the Navajo Tribe.

(b) *Navajo Source Gains.* "Navajo Source Gains" of a Navajo Branch are the gross receipts of that branch from the sale either within or without the Navajo Nation of Navajo goods or services, as those terms are defined in Paragraphs (c) and (d), minus deductions allowable under Section 5 of this title:

(i) *Computation of Value of Sales Without the Navajo Nation.* Navajo Source Gains for sales without the Navajo Nation are determined by the value of Navajo goods and services at the time and place said goods and services are transported outside the Navajo Nation.

(c) *Navajo Goods.* "Navajo Goods" are all personal property produced, processed, or extracted within the Navajo Nation, including coal, oil, uranium, gas, and other natural resources and electrical power.

(d) *Navajo Services.* "Navajo Services" are all services performed within the Navajo Nation, including the transport or transmission by whatever means of coal, oil, uranium, gas, other natural resources and electrical power.

(e) *Sale.*

(i) *General Rule.* A "Sale" consists of a transfer of title between buyer and seller for a price.

(ii) *Intra-Branch Rule.* A "Sale" also consists of the delivery of Navajo goods or the performance of services by a Navajo Branch for the use or benefit of any entity, organization, or other person of which the branch is a part.

(f) *Person; Control; Related Persons.*

(i) *Person.* "Person" means an organization of any kind, whether it be a sole proprietorship, partnership, trust, estate, an association, a corporation or government, whether organized for profit or not and includes as well any branch, division or agency of such. In addition, "Person" includes individuals or group of individuals.

(ii) *Control.* "Control" includes the right or any kind of ability to direct the performance or activity of another person, direct or indirect, whether legally enforceable or not and however such right may be exercisable or exercised.

(iii) *Related Persons.* "Related Persons" are two or more persons owned or controlled by the same interest. "Related Persons", as applied to individuals, also means two or more individuals who have a legal relationship arising out of marriage or adoption or blood, through the third degree of kinship.

(g) *Gross Receipts.* "Gross Receipts" of the Navajo Branch mean and are to be computed according to the following rules:

(i) *General Rule.* Except as provided in Subparagraphs (ii) and (iii) below, the "Gross Receipts" of the Navajo Branch are the amount of money plus the fair market value of property received by the Branch on sale of Navajo goods and services.

(ii) *Sales Among Related Persons.* On the sale of Navajo goods and services by a Navajo Branch to a related person, "Gross Receipts" are the fair market value of the Navajo goods or services sold.

(iii) *Estimate of Fair Market Value.* When practical, fair market value of Navajo goods and services sold to a related person is to be computed on the basis of prices paid in comparable transactions, but if such information is not available, the estimate of fair market value will be made according to Regulations adopted by the Commission.

(h) *Commission.* "Commission" means the Navajo Tax Commission.

(i) *Fraud.* "Fraud" has the same meaning as that established in the interpretation of Section 7206 of Title 26 of the United States Code.

SECTION 4. IMPOSITION OF TAX.

A tax is hereby imposed on the Navajo source gains of a Navajo Branch at a rate established by Section 6 and the regulations thereunder. The amount of tax due for any period is computed by multiplying the Navajo source gains of a Navajo Branch for the period by the tax rate.

SECTION 5. DEDUCTIONS.

In computing the tax payable under this Act, a taxable person may deduct from his Navajo gross receipts

the Standard Deduction set forth in Subsection (a) and the expenses set forth in Subsection (b).

(a) *Standard Deduction.* A Standard Deduction of ten (10%) percent of the taxable person's Navajo Gross receipts during the period for which taxes are being assessed and collected or \$125,000.00, whichever is greater, is allowed.

(b) *Deductible Expenses.* A taxable person may deduct from his Navajo gross receipts the following expenses paid or accrued during the period for which taxes are being assessed and collected from his activities giving rise to Navajo gross receipts:

(i) Salaries or other compensation paid to members of the Navajo Tribe.

(ii) Purchases of Navajo goods and services.

(iii) Any payment made to the government of the Navajo Nation, except for taxes paid pursuant to this Act and any penalties or fines.

SECTION 6. RATES OF TAX.

Tax is assessed on Navajo source gains at the rate established in Regulations by the Navajo Tax Commission. The rate will be no less than four (4%) percent or greater than eight (8%) percent. Until some other rate is established, the rate is five (5%) percent. A change in the tax rate must be announced at least one full period before its scheduled effective date.

SECTION 7. PERIOD OF TAX.

The tax under this Act is assessed and collected each quarter of the calendar year.

SECTION 8. CONSOLIDATION OF BRANCHES.

If any entity has more than one branch within the Navajo Nation or there exists more than one branch within the Navajo Nation controlled by related persons, then either all said branches shall be entitled to one \$125,000.00 standard deduction collectively, or each branch must take the ten (10%) deduction provided in Section 5 (a).

SECTION 9. NONDISCRIMINATION.

No provision of this Act shall be construed as imposing a tax which discriminates on the basis of whether a Navajo Branch is owned or controlled by members of the Navajo Tribe.

SECTION 10. EXEMPTIONS.

(a) Nothing within this Act shall be construed as imposing a tax on the government of the Navajo Tribe or on any wholly owned subdivision or enterprise of the government of the Navajo Tribe.

(b) Nothing within this Act shall be construed as imposing a tax on commercial establishments that are primarily engaged in selling non-Navajo goods at retail within the Navajo Nation.

(c) Nothing within this Act shall be construed as imposing a tax on traditional farming or livestock activities within the Navajo Nation.

PART C: ADMINISTRATION

SECTION 11. FILING OF TAX DECLARATION.

A declaration of tax due must be filed with the Commission within one month after the end of each calendar

quarter. Declaration are due on May 15, August 15, November 15, and February 15 of each calendar year.

SECTION 12. PAYMENT OF TAX.

Payment is due at the time of the filing of a declaration. The Commission, however, may require payment of tax on a monthly basis in appropriate cases.

SECTION 13. PERSONS REQUIRED TO FILE AND MAKE PAYMENT.

(a) Except as provided in Paragraph (c), each Navajo Branch must designate a natural person as the individual responsible for filing a declaration and making payment of the tax due. The individual designated must be empowered to act on behalf of the Branch on all matters relating to the tax imposed under this Act.

(b) Except as provided in Paragraph (c), each individual designated to file and make payment due in accordance with Paragraph (a) above must file a declaration on behalf of the Navajo Branch and make payment due on behalf of the Navajo Branch.

(c) Exceptions:

(i) The obligation to designate a natural person set forth in Paragraph (a) does not apply until a Navajo Branch has Navajo gross receipts of \$125,000.00 or more in any quarter after the effective date of this Act.

(ii) No declaration need be filed by any Navajo Branch for any quarter in which Navajo gross receipts are less than \$125,000.00. This exception does not apply if the Navajo Branch, or any related person to the Branch had annual Navajo gross receipts exceeding \$500,000.00 in

any of the three (3) years preceding the calendar quarter in question.

SECTION 14. EXTENSION OF TIME FOR FILING DECLARATION.

The individual responsible for filing a declaration on behalf of a Navajo Branch may request an extension of time for complying with the requirements of Section 11. The request should be made to the Commission in writing and must be made before the due date for the declaration. An extension of time will be granted only for good cause and at the discretion of the Commission.

SECTION 15. EXTENSION OF TIME FOR PAYING TAX.

The Commission may establish procedures for staying the payment of taxes assessed which are being appealed before the Commission. In no case may payment be stayed more than ten (10) days after a decision on an appeal has been rendered by the Commission.

SECTION 16. COLLECTION POWERS.

The Commission shall have full power to collect taxes and penalties assessed, including the power to attach and seize assets of a Branch and any other powers available to the Navajo Nation for collection of debts owed it.

SECTION 17. ASSESSMENT POWERS.

The Commission shall have the power to reassess a taxpayer when it appears that the declaration filed by the taxpayer does not reflect the amount of tax due under this Act. If no declaration is timely filed, the Commission is

authorized to make an estimate of the tax due, and this estimate is binding on the taxpayer unless it is shown that the estimate was grossly erroneous.

SECTION 18. RECORD KEEPING REQUIREMENTS.

(1) Every taxable person shall keep full and true records of the gross receipts for each period received from sale of Navajo goods and services and of all deductible expenses, in accordance with the Regulations established by the Commission.

(2) In the case of a Navajo Branch which is part of a corporation, partnership, association or other legal entity, separate accounting books for the Branch must be maintained.

(3) Records required to be kept under this section must be preserved for six years beyond the time payment of tax is made, or if no payment is due, for six years beyond the end of the payment to which the records relate.

SECTION 19. APPEALS PROCEDURES FOR CONTESTED TAX LIABILITIES.

(a) Appeals of assessments under this Act are to be made in the first instance to the Commission according to the procedures of the Commission.

(b) Appeals from a determination of the Commission are to be made to the Court of Appeals of the Navajo Nation, according to procedures established by the Commission, but in no case may an appeal be made to the Court of Appeals by the Navajo Nation until payment of the tax assessed by the Commission has first been made.

(c) The Commission shall be empowered to hold contested amounts in interest-bearing trust accounts, according to procedures which it shall establish.

SECTION 20. STATUTE OF LIMITATIONS.

(a) Any tax imposed by this Act shall be assessed within six years after the declaration was filed; except as provided in Paragraphs (b) and (d).

(b) In the case of a false fraudulent declaration with the intent to evade tax, the tax may be assessed within six years of the first discovery of the fraud.

(c) Any action in a court or by levy for collection of tax imposed under this Act must be commenced within six years of the assessment of the tax, except as provided in Paragraphs (d) and (e).

(d) The running of the period of limitations provided in Paragraphs (a) and (c) is suspended during any period the Commission is prohibited by any court from making an assessment or commencing collection proceedings and during any period of appeal of an assessment made by the Commission.

(e) The running of the period of limitations of collection may be suspended for any period agreed upon between the taxpayer and the Commission.

SECTION 21. INTEREST.

Interest at an annual rate to be provided in the regulations of the Commission shall be collected on any unpaid amount of tax from the date the payment was due to the date payment is received, and shall be remitted to the taxpayer on any overpayment of tax from the date the payment was made to the date the overpayment is refunded.

SECTION 22. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

No suits for the purpose of restraining the assessment or collection of the tax imposed under this Act shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

SECTION 23. POWER TO NEGOTIATE TAX AGREEMENTS.

The Commission is authorized to negotiate mutual assessment and collection assistance agreements with any other tax jurisdiction. The agreements so negotiated will come into force only upon ratification by the Advisory Committee, Navajo Tribal Council.

PART D. PENALTIES

SECTION 24. PENALTIES FOR FAILURE TO FILE.

(a) If a person required under Section 13 of this Act to file a declaration fails to file in a timely manner, a penalty of two (2%) percent of the gross receipts of the Navajo Branch for the period will be assessed against the Branch by the Commission.

(b) An additional penalty of one-fourth ($\frac{1}{4}\%$) percent of the gross receipts of the period, not to exceed six (6%) percent of those gross receipts, will be assessed by the Commission for each month's delay in filing a declaration.

(c) The penalty for failure to file will be assessed even if it is ultimately determined that no tax is due for the period.

(d) A person who files within the extended period permitted under Section 14 is considered to have filed in a timely manner.

SECTION 25. PENALTIES FOR FAILURE TO PAY.

(a) If a Navajo Branch fails to pay an amount assessed at the time due, a penalty of five (5%) percent of the amount assessed will be imposed by the Commission.

(b) If a Navajo Branch fails to pay an amount assessed at the time due, an additional penalty of one-half ($\frac{1}{2}\%$) percent for each full month of delay in making payment will be imposed by the Commission.

SECTION 26. PENALTY FOR FAILURE TO DESIGNATE PERSON TO FILE AND MAKE PAYMENT.

A Navajo Branch which fails to designate a person to file and make payment as required under Section 13 may have all rights to engage in productive activity within the Navajo Nation suspended by the Commission and shall be subject to permanent loss of all rights to engage in productive activity with the Navajo Nation. The Commission is authorized to impose the penalties under this section, subject to review by the Court of Appeals of the Navajo Nation.

SECTION 27. PENALTY FOR FAILURE TO PROVIDE INFORMATION REQUESTED.

A person required to provide information necessary or helpful for the assessment or collection of tax who fails to do so may be fined up to \$5,000.00 for each offense and may have all rights to engage in productive activity within the Navajo Nation suspended. Such persons must first be notified in writing of the request for information and must be given adequate opportunity to comply before any penalty is imposed. The Commission is authorized to impose the penalties under this section, subject to review by the Court of Appeals of the Navajo Nation.

SECTION 28. PENALTIES FOR ATTEMPT TO EVADE OR DEFEAT TAX.

(a) Any Navajo Branch underpaying the tax imposed under this Act due to negligence or intentional disregard of the rules and regulations (but without the intent to defraud) shall be penalized \$100.00 for each offense plus ten (10%) percent of the underpayment of tax.

(b) If any part of an underpayment of tax is shown to be due to fraud, a Navajo Branch shall be penalized no less than twenty-five (25%) percent and no more than two-hundred (200%) percent of the underpayment. The penalty shall be imposed in the first instance by the Commission subject to review by the Court of Appeals of the Navajo Nation.

(c) Any person who assists a Navajo Branch in the fraudulent underpayment of taxes due under this Act shall be subject to a penalty of no less than \$100.00 for each underpayment plus twenty-five (25%) percent of the amount of the underpayment.

VCLASSIS & OTT
1545 WEST THOMAS ROAD
PHOENIX, ARIZONA 85015
(602) 248-8811

Attorneys for Navajo Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. Civ. 80-247-PHX-WPC

KERR-McGEE CORPORATION,
a Delaware corporation,

Plaintiff,

v.

NAVAJO TRIBE OF INDIANS, et al.,
Defendants.

DEFENDANTS' STATEMENT OF FACTS UNDER LOCAL RULE 11(i) IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF KERR-McGEE

1. Kerr-McGee Corporation is a non-Indian corporation which presently conducts oil and gas operations within the Navajo Reservation in Arizona. (Complaint, ¶ 1; Stipulation dated December 7, 1979.)

2. The possessory interest tax enacted by Navajo Tribal Council Resolution CJA-13-78 and the business activity tax enacted by Navajo Tribal Council Resolution CAP-36-78 by their terms are applicable to the Kerr-McGee Corporation oil and gas operations on the Navajo Reservation in Arizona. (Complaint, ¶ 1, 17.)

3. By memorandum dated June 6, 1959, a copy of which is attached hereto as Exhibit "A", the Solicitor's

Office of the Department of the Interior determined that Navajo resolutions governing tribal labor policy did not require Secretarial approval.

4. By letter dated June 9, 1978 and by memoranda of May 15, 1978 and May 4, 1978, copies of which are attached hereto as Exhibits "B", "C" and "D", the Department of the Interior determined that the Navajo Possessory Interest Tax did not require Secretarial approval and so informed the tribe.

DATED: 4-5-82

Respectfully submitted,
VLASSIS & OTT
1545 West Thomas Road
Phoenix, Arizona 85015

By /s/ Katherine Ott
George P. Vlassis
Katherine Ott
Gary Verburg

EXHIBIT "A"

9-1 9

Surname:
FILE COPY
Sol. Indians

[Seal]

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D.C.

Memorandum

Jun 6, 1959

To: Commissioner of Indian Affairs
From: Assistant Solicitor, Indian Legal Activities
Subject: Approval of Tribal Ordinances

With respect to the Navajo tribal resolutions recently enacted involving tribal labor policy, I am aware of nothing in the law or regulations concerning Indian Affairs which requires you to approve or disapprove such resolutions.

It has been emphasized that "Indians are not wards of the Executive officers, but wards of the United States." (*Ex Parte Bi-A-Lil-Le*, 100 Pac 450 (1909); see *Fed. Indian Law*, 1958, p. 563)). Congress has not required the Secretary to approve tribal ordinances, nor has the President or the Secretary, under authority delegated by Section 2 of 25 U.S.C., seen fit to issue regulations referring to Secretarial consideration or approval of tribal ordinances. Many tribal constitutions adopted pursuant to Section 16 of the Indian Reorganization Act (25 U.S.C. 476, 48 Stat. 987), contain provisions implying Secretarial consideration of tribal ordinances, at least, in special cases. These provisions were inserted by the Tribe with the consent of the Secretary. This is within his authority, but it is not a Congressional mandate. The Navajos have no such written constitution.

The Secretary has a responsibility to encourage and assist Indian tribes under federal guardianship to carry out their tribal governmental functions and to conduct their tribal business in a legal and efficient manner. This task is obviously limited, however, by personnel and funds, as well as by the Congressional policy to encourage the Indians to assume continuously increasing responsibility and to develop self-reliance.

In addition, certain resolutions may concern tribal action which by statute require Secretarial approval, such

as encumbrances of tribal property. Here the Secretary must act because the statute requires approval of the specific act. The resolutions attached are not of this nature.

/s/ Franklin C. Salisbury
Assistant Solicitor
Indian Legal Activities

cc: Secretary's Files
Solicitor's Files
Asst. Sol., ILA
Assoc. Sol., IA
JBrabner-Smith

JBrabner-Smith:amj:6/8/59

Attachments

EXHIBIT "B"

UNITED STATES DEPARTMENT OF
THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Navajo Area Office
Window Rock, Navajo Nation, AZ 86515

[SEAL]

In Reply Refer to
101—Area Tribal
Operations

June 9, 1978

Mr. Peter MacDonald
Chairman, Navajo Tribal Council

Dear Mr. MacDonald:

Enclosed please find a copy of Navajo Tribal Council Resolution CJA-13-78, entitled "*Enacting the Navajo Possessory Interest Tax*".

This resolution was classified Class "A", requiring Washington approval. However, a copy of memorandum dated May 4, 1978 from Associate Solicitor to Director, Office of Trust Responsibilities is enclosed, explaining why this resolution does not require Washington approval. Also enclosed is a memorandum dated May 15, 1978 from Assistant Secretary — Indian Affairs to the Area Director, Navajo Area.

These memoranda are self-explanatory and in accordance, classification of Resolution CJA-13-78 has been changed to Class "C", requiring no BIA action.

Sincerely yours,

/s/
Area Director

Enclosures

EXHIBIT "C"

UNITED STATES DEPARTMENT OF
THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20240

[SEAL]

May 15, 1978

Memorandum

To: Area Director, Navajo Area Office
From: Assistant Secretary — Indian Affairs
Subject: Navajo Possessory Interest Tax (Tribal Resolution CJA-13-78)

Attached, for your information, is a copy of a memorandum prepared by the Office of the Solicitor as to whether or not the subject ordinance requires approval by the Secretary. You are accordingly advised that the ordinance does not require Secretarial approval.

/s/ Forrest J. Gerard

Attachment

RECEIVED
ADMINISTRATION
[Illegible] 1978
NAVAJO
AREA OFFICE

Inc—101
Cy—Ea. Azy Supt
100
102

EXHIBIT "D"

(SEAL)

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MEMORANDUM

MAY 4, 1978

To: Director, Office of Trust Responsibilities
From: Associate Solicitor, Division of Indian Affairs
Subject: Navajo Possessory Interest Tax

This responds to your memorandum of April 26, 1978, requesting a written opinion from this office on whether Secretarial approval is required for Navajo Tribal Council

cil Resolution CJA-13-78, which enacts a possessory interest tax.

The memorandum of February 15, 1978, from the Acting Navajo Area Director to the Assistant Secretary submitting the resolution for review suggests the resolution may require approval because it repeals portions of earlier tribal resolutions that were subject to Secretarial approval. Those earlier resolutions required Secretarial approval because they leased restricted land or granted easements on such lands and Secretarial approval of such tribal actions is required under 25 U.S.C. §§ 323 and 415. Neither of those sections, however, authorize Secretarial approval or disapproval of a tribal ordinance merely because it affects in some manner a prior resolution that was subject to Secretarial approval.

Resolution CJA-13-78 does not purport to lease restricted land or to grant easements over such land. Neither does it purport to take any other action which, under federal statute or regulation or under tribal law, is subject to Secretarial approval or disapproval.

Accordingly, we conclude that Navajo Tribal Council Resolution CJA-13-78 does not require Secretarial approval.

/s/ Thomas W. Fredericks

VLASSIS & OTT
1545 WEST THOMAS ROAD
PHOENIX, ARIZONA 85015
(602) 248-8811

Attorneys for Navajo Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 80-247-PHX-WPC
 KERR-McGEE CORPORATION,
 a Delaware corporation,
 Plaintiff,

v.

NAVAJO TRIBE OF INDIANS, et al.,
 Defendants.

ANSWER TO FIRST AMENDED COMPLAINT

(Filed May 7, 1982)

Defendants Navajo Tribe, Navajo Tax Commission, Peter MacDonald, Robert Shorty, Jr., Glenn George, William Morgan, Jr. and Lawrence White answer Kerr-McGee's First Amended Complaint as follows:

1. Admit the allegations contained in paragraphs 3, 4, 5, 6, 7, 19, 30, 41, 42, 48, 103 and 108.

2. Deny each and every allegation contained in paragraphs 11, 12, 13, 14, 15, 16, 17, 31, 36, 37, 38, 39, 44, 45, 46, 47, 50, 51, 52, 56, 57, 58, 60, 61, 62, 70, 71, 73, 75, 77, 78, 79, 81, 83, 84, 86, 89, 90, 93, 94, 96, 98, 99, 100, 102, 104, 105, 106, 109, 111, 112 and 116.

3. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2, 10, 21, 22, 23, 24, 25, 26, 27, 64, 65, 66, 67, 68, 69, 76, 87, 88 and 95, and, therefore, deny the same.

4. With respect to the allegations contained in paragraph 1 of Plaintiff's First Amended Complaint, defendants admit that the Navajo Tribal Council enacted a Business Activity Tax and a Possessory Interest Tax which apply to business activity conducted on lands under Nava-

jo Tribal jurisdiction and to leasehold interests entered into with the Navajo Tribe; admit that both the tax laws confirm jurisdiction in the Navajo Tribal Courts to adjudicate all controversies concerning the taxes. Defendants deny that they are interfering with Kerr McGee's oil and gas operations and deny that they are breaching Kerr McGee's oil and gas mineral leases. With respect to the remaining allegations in paragraph 1 of the First Amended Complaint, defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations and therefore deny such allegations.

5. With respect to the allegations contained in paragraph 8 of the First Amended Complaint, defendants admit that they are acting pursuant to Navajo Tribal authority and deny the remaining allegations.

6. With respect to paragraph 9, deny that the complained of actions of James G. Watt exceeds his lawful authority and admit the remaining allegations.

7. With respect to the allegations contained in paragraph 18, allege that lands in addition to treaty and executive order lands are part of the Navajo Reservation in the State of New Mexico and admit all remaining allegations.

8. With respect to the allegations contained in paragraph 20, admit the allegations contained therein, and further allege that the Secretary of Interior has determined that his approval of Navajo tax laws is an unnecessary pre-condition to the taxes validity.

9. With respect to the allegations in paragraph 28, 40, 53, 63, 74, 80, 85, 91, 101 and 107, defendants incorpo-

rate by reference each and every answer set forth herein to the allegations incorporated by reference in paragraphs 28, 40, 53, 63, 74, 80, 85, 91, 101 and 107 of the First Amended Complaint.

10. With respect to the allegations contained in paragraph 29, Defendants admit that the Tribe exercises powers of self-government over its members and over its territory.

11. With respect to the allegations contained in paragraph 32, Defendants admit that it has no criminal jurisdiction over non-Indians and denies the remaining allegations contained therein.

12. With respect to the allegations contained in paragraph 33, defendants admit that plaintiff is neither an Indian nor member of the Navajo Tribe and alleges that Kerr-McGee is a fictitious person, a corporation, which possesses no ethnicity or racial characteristics.

13. With respect to the allegations contained in paragraph 34, defendants admit that the taxes purport to empower the Tribe to suspend permanently Plaintiff's right to engage in oil and gas mineral operations on and under the Reservation in the event of non-compliance with the taxes in accord with the Treaty of 1868 between the Navajo Tribe and the United States of America. Defendants deny the remaining allegations contained in paragraph 34.

14. With respect to the allegations contained in paragraphs 35 and 49, defendants admit that Kerr-McGee is not a trespasser, but denies that Plaintiff has any right to remain on the Reservation if Plaintiff disregards valid and enforceable Tribal laws.

15. With respect to the allegations contained in paragraph 43, defendants admit that the Treaty of June 1, 1868, states that the Navajo Tribe "will not in future oppose the construction of railroads, wagon-roads, mail stations or other works of utility or necessity which may be ordered or permitted by the laws of the United States . . ." provided that the "Government will pay the Tribe whatever amount of damage may be assessed . . ."

16. With respect to the allegations contained in paragraph 54, defendants admit that the United States possesses plenary power over the Navajo Tribe, but denies that such power can be exercised in an unconstitutional manner.

17. With respect to the allegations in paragraph 55, defendants admit that plaintiffs are subject to rules and regulations promulgated by the Secretary, but denies the remaining allegations contained therein.

18. With respect to the allegations contained in paragraph 59, Defendants are without knowledge or information to form a belief as to the truth of the location of Plaintiff's mineral leases and, therefore, denies the same. Defendants deny the remaining allegations in paragraph 59.

19. With respect to the allegations contained in paragraph 72, defendants admit that the taxes provide for suspension of plaintiff's right to engage in oil and gas and mineral operations on and under the Reservation for non-compliance with the taxes; denies that such conduct constitutes a violation of plaintiff's right to enjoy the demised premises; and is without sufficient knowledge and information to form a belief as to the truth of a covenant

between the Tribe and plaintiff entitling plaintiff to the quiet and peaceable enjoyment of the demised premises and therefore denies the same.

20. With respect to the allegations contained in paragraph 82, defendants admit that the taxes exempt from taxation Tribally owned enterprises, activities and possessory interests of the Tribe. Defendants deny that the taxes provide a direct commercial advantage to local business. With respect to the remaining allegations in paragraph 82, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, deny the same.

21. With respect to the allegations in paragraph 92, defendants admit that the Indian Civil Rights Act provides as follows:

"No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of \$500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons."

22. With respect to the allegations in paragraph 97, defendants admit that the taxes exempt Tribally owned enterprises, activities, and possessory interests of the Tribe and admits that the possessory interest tax exempts from taxation possessory interests valued at less than \$100,000, and admits that traditional activities are exempt under the Business Activity Tax. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 97 and, therefore, deny the same.

23. With respect to the allegations contained in paragraph 110, defendants admit the allegations contained

therein, and further allege that the Secretary has determined that his approval of the taxes is not necessary.

24. With respect to the allegations contained in paragraph 113, defendants deny that the Business Activity Tax purports to have become effective as of July 1, 1978 and admits the remaining allegations contained therein.

25. With respect to the allegations in paragraph 114, defendants admit the allegations contained therein in the event that plaintiff does not comply with taxes.

26. With respect to the allegations in paragraph 115, defendants admit that the Business Activity Tax is due 45 days after formal adoption of Navajo Tax Commission rules and regulations and deny the remaining allegations contained therein.

FIRST AFFIRMATIVE DEFENSE

Plaintiff's First Amended Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Defendant Navajo Tribe of Indians and the Navajo Tax Commission, as an agency of the Navajo Tribe, enjoy sovereign immunity from suit which has not been waived by the Tribe. Individual Navajo defendants, as officers of the Tribe, enjoy immunity from suit for all activities conducted pursuant to lawful Tribal authority and the Navajo tax laws are a lawful exercise of such Tribal authority.

THIRD AFFIRMATIVE DEFENSE

In the event that the Tribal taxes violate plaintiff's leases, Count IV of plaintiff's First Amended Complaint is barred on the grounds that the Navajo land leases possessed by plaintiff are unconscionable and void, unenforceable and of no effect.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff, by failing to join the Secretary of Interior, has failed to join an indispensable party under Rule 19 of the Federal Rules of Civil Procedure.

WHEREFORE, Navajo defendants request judgment dismissing the Complaint and that costs and expenses incurred in the litigation of this action by Navajo defendants be awarded to Navajo defendants.

RESPECTFULLY SUBMITTED this 7th day of May, 1982.

Vlassis & Ott

By /s/ Katherine Ott
George P. Vlassis, Esq.
Katherine Ott, Esq.
1545 West Thomas Road
Phoenix, Arizona 85015

COPY of the foregoing mailed/hand-delivered this 7th day of May, 1982, to:

The Honorable William P. Copple
United States District Court
District of Arizona
230 North 1st Avenue, Room 7025
Phoenix, AZ 85025

Alvin H. Shrago, Esq.
 Fred E. Ferguson, Jr., Esq.
 EVANS, KITCHEL & JENCKES, P.C.
 363 North 1st Avenue
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 PASKIND, LYNCH & DOW, P.A.
 618 Manzano, N.E.
 Albuquerque, N.M. 87110

/s/ Katherine Ott

MEMORANDUM OPINION AND ORDER,

United States District Court for the
 District of Arizona, *Kerr-McGee
 Corporation v. Navajo Tribe of Indians,
 et al.*, NO. CIV 80-247 PHX WPC

(filed June 29, 1982)

This document is printed as Appendix B of the Appendix to the Petition for a Writ of Certiorari. It is not reprinted here.

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT COURT OF ARIZONA

No. CIV-80-247 PHX-WPC

KERR-McGEE CORPORATION,
 Plaintiff,

v.

NAVAJO TRIBE OF INDIANS, et al.,

Defendants.

JUDGMENT AND PERMANENT INJUNCTION
 (Filed September 22, 1982)

In accordance with this Court's Memorandum and Order of June 29, 1982, and for the reasons stated therein,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Except for the Navajo Tribe of Indians and the Navajo Tax Commission as to which plaintiff's amended complaint is dismissed on the basis of sovereign immunity, this Court has jurisdiction over the parties and the claims asserted by plaintiff Kerr-McGee Corporation pursuant to 28 U.S.C. § 1331.

2. The defendants' motion for summary judgment with respect to Counts I, II, III, IV, V, VI, VII and VIII of the amended complaint is granted and those Counts are accordingly dismissed.

3. On motion by plaintiff, Count X is dismissed without prejudice pursuant to Rule 41(a), *Fed. R. Civ. P.*

4. Plaintiff's motion for summary judgment with respect to Count IX of the amended complaint is granted.

5. The Business Activity Tax and the Possessory Interest Tax which the Navajo Tribe enacted in 1978 as Navajo Tribal Council Resolution CAP-36-78 and Resolution CJA-13-78, respectively, are null, void, illegal, invalid and unenforceable against plaintiff Kerr-McGee Corporation's operations on Navajo treaty lands in Arizona and the said taxes shall have no force or effect on such operations unless and until they receive the lawful ap-

proval of the Secretary of the Interior of the United States.

6. Defendants Peter MacDonald, Chairman of the Navajo Tribe of Indians; Robert Shorty, Jr., Glenn George, William Morgan, Jr., members of the Navajo Tax Commission; and Lawrence White, Director of the Navajo Tax Commission, as well as their successors and all persons in active concert or participation with them who receive actual notice of this order are permanently enjoined as follows:

(a) From applying, enforcing or attempting to enforce the said Business Activity Tax and the said Possessory Interest Tax against plaintiff Kerr-McGee Corporation's operations on Navajo treaty lands in Arizona.

(b) From levying, assessing, collecting, attempting to assess or attempting to collect against or from plaintiff Kerr-McGee Corporation any taxes on Kerr-McGee Corporation's operations on Navajo treaty lands in Arizona pursuant to the said Business Activity Tax and the said Possessory Interest Tax; and

(c) From initiating, seeking or issuing any order to show cause, restraining order, injunction or other order or judgment against plaintiff Kerr-McGee Corporation based upon or arising out of the said Business Activity Tax and the said Possessory Interest Tax as said taxes relate to Kerr-McGee Corporation's operations on Navajo Treaty lands.

7. Each party shall bear its own costs.

DATED: September 22, 1982.

/s/ William P. Copple
United States District Court Judge

OPINION, United States Court
of Appeals for the Ninth Circuit,
*Kerr-McGee Corporation v. Navajo Tribe
of Indians, et al.*, (filed April 17, 1984)
(731 F.2d 597)

This document is printed as Appendix A of the Appendix to the Petition for a Writ of Certiorari. It is not reprinted here.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-5725

USDC No. CV 80-247 PHX WPC

KERR-McGEE CORPORATION,
a Delaware corporation,

Plaintiff-Appellee,

vs.

NAVAJO TRIBE OF INDIANS,
Defendant-Appellant.

No. 82-5736

USDC No. CIV 80-247

KERR-McGEE CORPORATION,
a Delaware corporation,

Plaintiff-Appellant,

vs.

NAVAJO TRIBE OF INDIANS, a tribe of American
Indians recognized by the United States Department
of the Interior, et al.,

Defendants-Appellees.

ORDER

(Filed Apr. 17, 1984)

Before MERRILL, SKOPIL and FERGUSON, Circuit
Judges

MERRILL, Circuit Judge.

In its appeal in this action Kerr-McGee argued that the Navajo Tribe ought to be estopped from relitigating the issue of the necessity of approval by the Secretary of the Interior of certain taxes levied by the Navajo Tribe on mineral leases issued by the Tribe. Kerr-McGee had successfully urged the District Court to follow the holding of the Federal District Court for the District of Utah in *Southland Royalty Co. v. Navajo Tribe of Indians*, No. 79-0140 (D. Utah, March 8, 1979), so as to collaterally estop the Tribe from litigating the Secretary approval issue in the instant action.

In our Opinion, *Kerr-McGee v. Navajo Tribe of Indians*, Nos. 82-5725, 82-5736, April —, 1984), we noted that the Tenth Circuit had, in the interim, reversed the Utah District Court in its holding that approval of the Tribe's tax by the Secretary of the Interior was required. *Southland Royalty Co. v. Navajo Tribe of Indians*, 715 F.2d 486 (10th Cir. 1983). Accordingly, while we agreed with the reasoning of the Tenth Circuit in its conclusion that Secretarial approval was not required, we found it, of course, unnecessary to determine whether the Tribe was collater-

ally estopped from litigating the issue in light of the reversal of the lower court's opinion.

It is possible that the Tenth Circuit may yet consider the issue of Secretarial approval *en banc* and conclude—as did the Utah District Court—that approval by the Secretary of the Interior is the *sine qua non* of Indian taxation. In the event of such a determination by the Tenth Circuit, either *en banc* or upon rehearing, Kerr-McGee may again find it appropriate to raise the estoppel argument with respect to the issue of Secretarial approval. Nothing in our Opinion ought to be construed as precluding such action by Kerr-McGee in the event of a determination by the Tenth Circuit of the need for approval of the Navajo tax by the Secretary of Interior.

IT IS SO ORDERED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-5725

CV-80-247-PHX-WPC

KERR-McGEE Corp., a Delaware corp.,

Plaintiff/Appellee,

vs.

NAVAJO TRIBE OF INDIANS,

Defendants/Appellant.

No. 82-5736

CV-80-247-PHX-WPC

KERR-McGEE, Corp., a Delaware corp.,

Plaitniff/Appellant,

vs.

NAVAJO TRIBE OF INDIANS, et al.,
Defendants/Appellees.

APPEAL from the United States District Court for the District of Arizona (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed on appeal taken by Kerr-McGee. On the appeal taken by the Navajo Tribe, judgment Reversed.

Court Reporter
Public Defender
US Attorney
US Magistrate
Marshal
Probation
Counsel_____

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Filed and entered April 17, 1984